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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondents,

v.

HECTOR RAMON GODINEZ,

Defendant and Appellant.

B287393

(Los Angeles County
Super. Ct. No. SA092724)

APPEAL from an order of the Superior Court of Los Angeles County, Upinder S. Kalra, Judge. Affirmed and remanded with instructions.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald E. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Hector Ramon Godinez contends that the trial court abused its discretion when, following the dismissal of gang enhancement allegations that initially accompanied the robbery, assault, and Vehicle Code violation charges against him, the court denied a motion to strike gang-related testimony and exclude gang-related exhibits. Godinez contends that the gang-related evidence was irrelevant and unduly prejudicial, and that its admission rendered the trial fundamentally unfair. Godinez also contends that defense counsel's failure to make additional efforts to exclude this evidence constituted ineffective assistance of counsel. We disagree.

The trial court admitted the gang-related evidence as probative of motive, identity, and a key witness's credibility, and instructed the jury to consider the evidence solely for the purpose of determining motive and identity. Because the evidence was properly admitted, both Godinez's due process and ineffective assistance claims fail.

Godinez also requests remand in light of Senate Bill No. 1393, which went into effect on January 1, 2019, and renders discretionary the previously mandatory five-year sentence enhancement under Penal Code section 667, subdivision (a)(1).¹ We agree that Senate Bill No. 1393's potentially ameliorative amendments should apply to Godinez's sentencing.

Accordingly, we affirm the convictions, but remand so that the trial court may consider whether to exercise its newly enacted discretion to strike a prior conviction for the purposes of avoiding section 667, subdivision (a)(1), five-year sentencing enhancement.

¹ Unless otherwise stated, all further statutory references are to the Penal Code.

FACTUAL BACKGROUND

A. *Initial Charges Against Godinez*

In a criminal information, the People charged Godinez with violations of the Penal Code and Vehicle Code associated with two separate incidents. Count 2 of the information charged Godinez with driving or taking a vehicle without consent of the owner (Veh. Code, § 10851, subd. (a)), based on an April 7, 2016 incident involving a grey Honda. Counts 1 and 3 arose from an altercation with Marlon T. on April 11, 2016, and charged Godinez with second degree robbery and assault with a deadly weapon. (§§ 212.5, subd. (c), 245, subd. (a)(1).) The information further alleged that Godinez personally used a deadly and dangerous weapon (a knife) in robbing Marlon T. (§ 12022, subd. (b)(1).) The information also alleged that all three counts were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members, in violation of section 186.22, subdivision (b)(1)(B) and (C).

B. *Prosecution's Evidence of Underlying Offenses*

1. *Theft of grey Honda (count 2)*

It was stipulated at trial that on April 7, 2016, surveillance video showed Godinez enter the valet parking station of Busby's restaurant in Santa Monica and drive away in a grey Honda Civic belonging to Stephanie P. Stephanie P. testified at trial that she did not know Godinez and never gave him permission to drive her car.

2. *Assault and robbery of Marlon T.*
(counts 1 and 3)

Marlon T. testified at trial to the altercation underlying counts 1 and 3 as follows: While driving to make a delivery for his employer on April 11, 2016, Marlon T. stopped for a red light at the intersection of Olympic and Stewart. He was alone in the car with his windows rolled all the way down and the radio on loudly. He was wearing a short-sleeved T-shirt which partially exposed his non-gang related arm tattoos. Marlon T.'s wallet, personal cellular phone, and a check he was delivering for his employer were on the passenger seat.

While stopped, Marlon T. noticed Godinez, who was two lanes over in a grey Honda Civic, also stopped at the red light. Marlon T. could hear Godinez asking, “ ‘Hey, homie, where you from?’ ” in a voice that was “kind of mad” and “demanding.” Marlon T. responded by asking, “Who are you talking to?” Godinez then got out of his car and walked towards the passenger window of Marlon T.'s car. When Godinez reached the passenger window, he again asked Marlon T. where Marlon T. was from and appeared to be looking at Marlon T.'s tattoos. Marlon T. testified that Godinez had his hands on the passenger windowsill as they spoke and that Marlon T. could see what he described as a pocket or folding knife with a four-inch blade in Godinez's right hand.

Marlon T. believed he heard Godinez claim to be from a specific gang, but Godinez spoke too quickly for Marlon T. to make out the name of the gang. When Marlon T. informed Godinez that Marlon T. was not in a gang, Godinez appeared angry and made a stabbing motion towards Marlon T. with the knife. Marlon T. moved closer to the driver's door to avoid the knife. Godinez then grabbed the items from the passenger seat and ran back to his car.

Marlon T. further testified that Godinez drove off, and Marlon T. gave chase, while at the same time using his business cellular phone to call 911. Marlon T. remained on the phone with the 911 operator telling her he was following Godinez and the route he was driving. Godinez ultimately parked his car and ran into an apartment building. Marlon T. chased Godinez to the second level of the apartment building. The police arrived shortly thereafter, but were unable to locate Godinez.

In addition to Marlon T.'s testimony regarding this incident, the prosecution offered the audio recording of Marlon T.'s 911 call. The prosecution also introduced evidence that a grey Honda left near the scene was later determined to belong to Stephanie P. and that Godinez's latent fingerprints were recovered from its exterior door.

Two days after the incident, Marlon T. identified Godinez from a six-pack photographic line-up. Police arrested Godinez, and recovered a folding knife from his pants pocket, which Marlon T. identified as the weapon used in the altercation on April 11. Marlon T. informed his employer that the check he was to deliver had been stolen, and a new check was issued. None of the other property Marlon T. testified was stolen was ever recovered.

C. Defense Arguments at Trial

The defense conceded at trial that Godinez had taken Stephanie P.'s grey Honda on April 7, 2016 and did not otherwise contest any element of count 2.

With respect to counts 1 and 3, Godinez did not contest that he had an exchange with Marlon T. on April 11, but contended the encounter did not occur as Marlon T. described. Godinez argued that Marlon T.'s testimony was not believable, citing inconsistencies between Marlon T.'s preliminary hearing testimony

and his testimony at trial, and that Marlon T.'s account of events was implausible.

In closing argument, Godinez's counsel specifically questioned the veracity of Marlon T.'s statements that Godinez had made gang-related comments to Marlon T., and disputed that Marlon T. could have seen Godinez's tattoos, given the witness's conflicting accounts at the preliminary hearing and at trial about what Godinez was wearing. Defense counsel also argued that there was "no apparent reason" for Godinez to approach Marlon T. in the manner Marlon T. described, and that this was one of the reasons Marlon T.'s testimony was implausible and lacked credibility.

D. Gang Evidence and Gang Enhancement Issues at Trial

The prosecution presented evidence that Godinez had self-identified as a member of the Santa Monica 13 gang, that his moniker was "Sana," and that he had gang tattoos. This evidence included testimony by four Santa Monica police officers regarding encounters with Godinez, field interview cards (FI cards) documenting those encounters, and photographs of Godinez's tattoos. The prosecution also presented testimony of Officer Barclay Bell regarding gang culture, including the importance of instilling fear in the community and the significance of territory. Officer Bell also opined regarding the Santa Monica 13 gang's drug sales, street robberies, property crimes, assaults, and other criminal offenses. Finally, Officer Bell testified that hypothetical crimes based on the facts of this case were committed for the benefit of, at the direction of, or in association with the gang to which the perpetrator belonged, and that such hypothetical crimes promoted and assisted in criminal conduct by gang members.

Before the prosecution offered any gang-related evidence, the trial court admonished the jury that this evidence was to be used for the limited purpose of assessing the gang enhancement allegations, should the jury determine Godinez committed the underlying offenses, and that the jury should “not conclude from this evidence that the defendant has a bad character or is disposed to commit a crime.”

Later, however, Godinez successfully moved to dismiss the gang enhancement allegations appended to all three counts. Following the court’s dismissal of the gang enhancement allegations, the trial court sustained the defense’s objection to evidence of predicate gang offenses. The court, however, denied defense counsel’s motion to strike the remainder of the gang evidence as irrelevant and unduly prejudicial. In considering the motion, the court acknowledged that the evidence was initially admitted for the specific purpose of supporting a gang enhancement allegation, but concluded it was nevertheless relevant in three ways: (1) to prove motive—specifically, a gang challenge—for the assault and robbery; (2) to corroborate Marlon T.’s account of the altercation as one that involved a gang challenge, and thereby bolster his credibility generally; and (3) to identify Godinez as the perpetrator. The court also acknowledged the “explosive” nature of gang evidence, but because limiting instructions could counteract any undue prejudice stemming from the evidence, the court concluded any such effect did not outweigh the probative value.

The court instructed the jury with the following limiting instructions at the conclusion of the trial: “The special allegation pursuant to Penal Code [s]ection 186.22[, subdivision](b)(1), also known as the gang enhancement, no longer needs to be decided in this case. The [c]ourt allowed evidence of gang activity for the

limited purpose of deciding this issue, motive and identification evidence. You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.” The court also instructed the jury on motive.

E. *Conviction and Appeal*

A jury found Godinez guilty on all three counts, and found the special weapon allegation appended to count 1 to be true. Godinez timely appealed the judgment of conviction.

DISCUSSION

I. *Due Process Argument Regarding Admission of Gang-Related Exhibits and Testimony*

Godinez contends that the trial court abused its discretion by permitting the jury to consider gang-related evidence as probative of motive, identification, and credibility, and that this error violated his federal due process rights, because it rendered his trial fundamentally unfair. According to Godinez, after the court dismissed the gang enhancement allegations, the gang-related evidence was no longer relevant to any element or fact at issue, and the undue prejudice that such evidence generated outweighed any minor probative value it might have. We disagree.

We review a trial court’s evidentiary rulings under the abuse of discretion standard. (*People v. Loza* (2012) 207 Cal.App.4th 332, 345.) “[T]he particular law being applied” determines “[t]he scope of discretion,” so an “abuse” of discretion occurs where a decision “transgresses the confines of the applicable principles of law” and thus is outside of that scope. (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297–1298.)

The applicable law governing the evidentiary decision Godinez challenges is straightforward. Evidence is relevant if it has “any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action,” (Evid. Code, § 210), but a trial court has discretion to exclude relevant evidence “if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice.” (Evid. Code, § 352.)

Evidence that a defendant is a gang member inherently poses a risk the jury will improperly infer that the defendant has a criminal disposition. (See *People v. Williams* (1997) 16 Cal.4th 153, 193–194 (*Williams*).) But this does not mean evidence of gang membership is “insulated” from the general rules governing relevance, prejudice, and admissibility. (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167–1169 (*Samaniego*).) Rather, trial courts should carefully scrutinize gang evidence before admitting it (*People v. Champion* (1995) 9 Cal.4th 879, 922 (*Champion*)), and should not permit gang evidence that is only “tangentially relevant.” (*People v. Cox* (1991) 53 Cal.3d 618, 660.)

Here, the trial court carefully scrutinized the evidence at issue and did not err in concluding that it was more than tangentially relevant and admissible to prove motive and bolster the credibility of the main witness and victim in counts 1 and 3. (See *Champion, supra*, 9 Cal.4th at pp. 922–923 [gang evidence relevant to motive]; *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1450 [gang evidence relevant to witness credibility].) The prosecution’s theory of the case was that Godinez approached Marlon T. as part of a territorial gang challenge. The defense argued Marlon T.’s testimony was generally implausible and not credible, and also specifically disputed that Godinez had mentioned

gang membership when approaching Marlon T. The defense supported its implausibility argument by claiming Godinez lacked any motive to approach Marlon T. in the manner Marlon T. described. Thus, while motive is not a necessary element of the crimes charged, it was a “disputed fact that is of consequence” at trial. (Evid. Code, § 210; see *Williams, supra*, 16 Cal.4th at pp. 193–194 [affirming admission of gang-related evidence to establish gang-related motive, though not an element of crime charged].) Evidence of Godinez’s gang membership, as well as testimony explaining the importance of territory-based gang challenges, has a “tendency in reason to prove” (Evid. Code, § 210), that Godinez had the specific motive posited by the prosecution. “[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.” (*People v. Lopez* (1969) 1 Cal.App.3d 78, 85.) This evidence is also relevant to the credibility of the prosecution’s primary witness, because it corroborates Marlon T.’s version of events, both generally and specifically with respect to the gang references Marlon T. described and Godinez’s counsel directly disputed.

Because identity was not a disputed issue at trial, the gang evidence had little probative value on that point. Were identity the only issue this evidence was offered to prove, it would be a closer question whether the risk of undue prejudice substantially outweighs the probative value. We need not decide this, however, as the gang evidence had significant probative value as to motive and the credibility of a key witness as well.

Given that significant relevance, the court sufficiently addressed the risk of undue prejudice with a limiting instruction

that explicitly informed the jury of the proper purposes for which the gang-related evidence may be considered. This instruction “states in no uncertain terms that gang evidence is not admissible to show that the defendant is a bad person or has a criminal propensity. It allows such evidence to be considered only on the issues germane.” (*Samaniego, supra*, 172 Cal.App.4th at p. 1168.) We may assume the jury understood and followed this instruction. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852; *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1404 [same with respect to CALCRIM No. 1403 instruction regarding inference of bad character or criminal disposition].) Thus, the trial court’s decision to admit the gang-related evidence with an appropriate limiting instruction was well within the scope of the applicable law, and was not an abuse of its discretion.

II. *Ineffective Assistance Argument*

Godinez next argues that his trial counsel was ineffective because she failed to challenge the gang-related evidence when given opportunities at five specific points before and during trial. Godinez contends that, had defense counsel made these additional efforts, the trial court would have excluded the gang-related evidence, or otherwise diluted their impact on the jury, resulting in a more favorable outcome for Godinez.

A defendant claiming ineffective assistance of counsel must establish both that his attorney’s representation fell below an objective standard of reasonableness and prejudice resulting therefrom.² (*Strickland v. Washington* (1984) 466 U.S.

² Appellant appears to suggest that *the state*, not Godinez, must establish lack of prejudice, and that it must do so beyond a reasonable doubt. This is the case only if federal constitutional

668, 687–688, 693–694 (*Strickland*); *People v. Pettie* (2017) 16 Cal.App.5th 23, 80.) The gang-related evidence Godinez contends his trial counsel should have fought harder to exclude was properly admitted as relevant to multiple issues. Thus, Godinez’s argument that additional efforts to exclude this admissible evidence would have yielded a more favorable result requires us to speculate regarding what the trial court might have done, had counsel further pressed the court. First, we would not want to encourage counsel to continue to press meritless arguments. Second, we are not permitted to engage in speculation. Third, because the rulings were correct, even were we to speculate, the outcome would still be the same. Thus, Godinez’s ineffective assistance claim fails for lack of prejudice. (See *Strickland, supra*, 466 U.S. at p. 697 [“[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed”].)

III. Senate Bill No. 1393 Argument

Godinez’s sentence included a five-year enhancement pursuant to the “Three Strikes” law, section 667, subdivision (a)(1), based on a prior serious felony conviction. The version of section 667, subdivision (a)(1) in effect at the time of Godinez’s

error is involved. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) It is “rare and unusual” for the admission of evidence to take on a constitutional dimension and requires that there be “ ‘no permissible inferences the jury may draw from the evidence’ ” and that the evidence be “ ‘of such quality as necessarily prevents a fair trial.’ ” (*People v. Albarran* (2007) 149 Cal.App.4th 214, 232, 229.) Not so here. As discussed above, the gang-related evidence is relevant to motive and Marlon T.’s credibility, and the limiting instruction addressed any impermissible inferences the jury might otherwise draw from it.

sentencing, did not permit the trial court to strike prior convictions for the purposes of avoiding such a five-year enhancement. Senate Bill No. 1393 changed this, however, effective January 1, 2019. Since that date, courts may exercise their discretion under section 1385 to strike, effectively, section 667, subdivision (a)(1) five-year enhancements in the interests of justice.

Godinez requests—and the People agree it would be appropriate—that we instruct the trial court to consider whether to impose the five-year sentencing enhancement that Senate Bill No. 1393 has rendered discretionary. Godinez argues that this change in law should be retroactively applied to all cases—including his—that were pending on January 1, 2019, when the law went into effect. Because we see nothing in the language or history of Senate Bill No. 1393 suggesting the Legislature intended otherwise, we agree. (See *In re Estrada* (1965) 63 Cal.2d 740, 742 [mandating retroactive application of sentence-ameliorating statute to all judgments not yet final on the date of enactment, absent evidence of contrary legislative intent]; *People v. Francis* (1969) 71 Cal.2d 66, 76 [applying *Estrada* to amended statute that increased court’s discretion to impose lesser sentence].)

DISPOSITION

We affirm. Upon remand, the trial court shall determine whether to strike the enhancement imposed under Penal Code section 667, subdivision (a)(1). If the court strikes the enhancement, the court shall reduce the sentence accordingly, amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.